FILE COPY

Office - Supreme Court, U.
FILED
MAY 3 1948

IN THE

Supreme Court of the United States

October Term 1947

No. 705

ELSA S. BURROWS, Joined by her Husband, WATERS F .BURROWS,

Appellants,

against

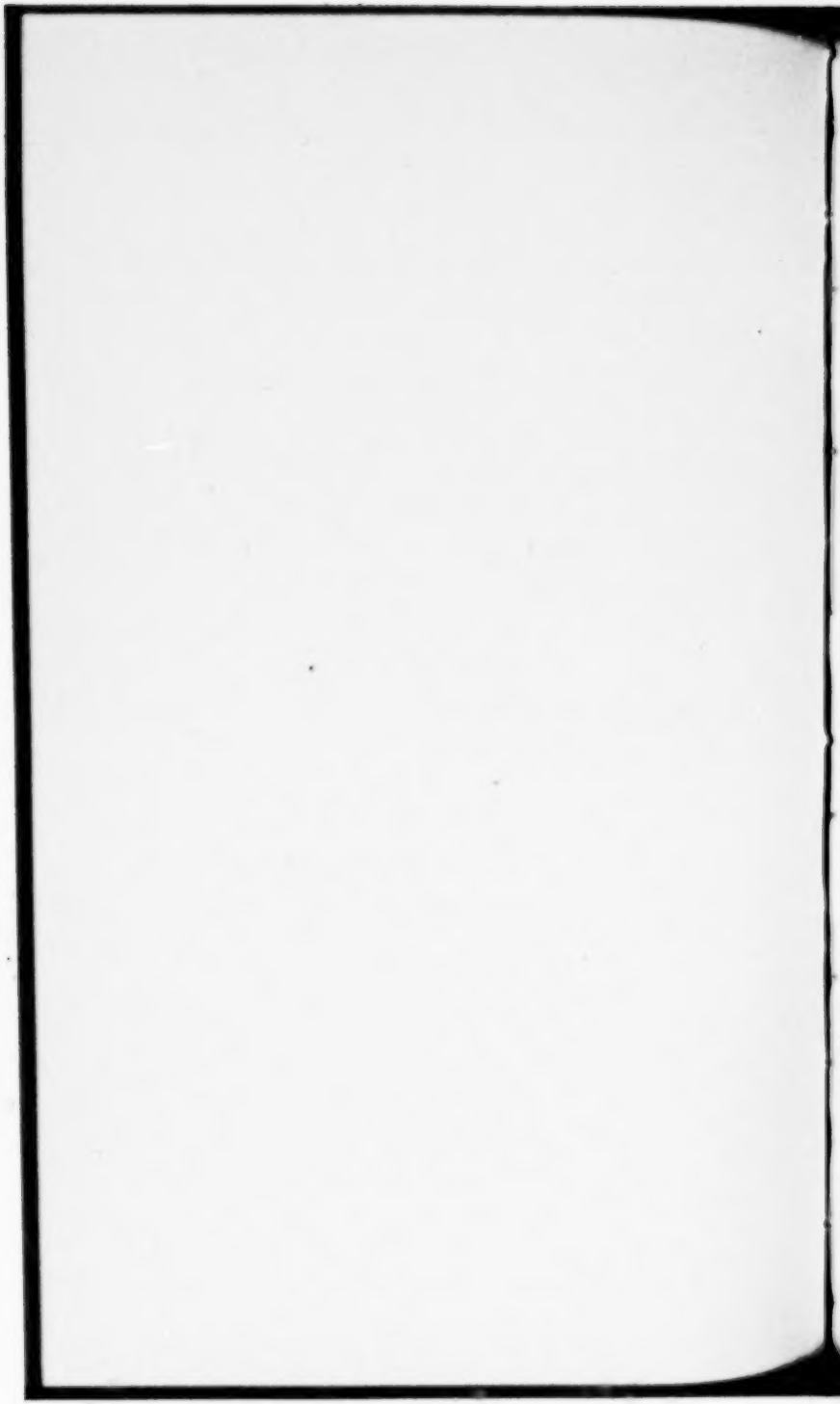
CHARLIE HAGERMAN, as Tax Collector of Sarasota County, Florida; GLOVER ASHBY, as Tax Assessor of Sarasota County, Florida; C. M. GAY, as Comptroller of the State of Florida, and LEROY FENNE,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT AND MOTION TO DISMISS THE APPEAL

RICHARD J. MACKEY,
Counsel for Appellants.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349



BLEED THROUGH- POOR COPY

INDEX

Subject Index

PAGE

PRESENT QUESTION INVOLVED 1

The appellants urge that the motion to dismiss should not be granted for the reasons set forth below:

(a) The case is not identical with the case of *Commonwealth* v. *Stewart*, 338 Pa. 9, as the Florida statute has been interpreted by the highest court of that State in a manner different from that in which the statute is interpreted in the Pennsylvania case, as least in so far as the testamentary trust under the Will of Oscar Scherer is involved 3

(b) This court has held that the power of appointment, such as given to the appellant, Elsa S. Burrows, by the Will of Oscar Scherer is not a right derived from the State of Florida since it represents property from a citizen of New York to the appointee named under the power 5

Table of Cases Cited

Brooke v. *City of Norfolk*, 277 U. S. 27 5

Commonwealth v. *Stewart*, 338 Pa. 9 3

Greenough v. *Tax Assessors*, 331 U. S. 486 5

Owens v. *Fosdick*, 153 Fla. 17, 13 So. 2nd 700 ..... 4, 5

Wachovia Trust Co. v. *Doughton*, 272 U. S. 567 5

BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

October Term 1947

No. 705

ELSA S. BURROWS, Joined by her Husband
WATERS F. BURROWS,

Appellants,

against

HARLIE HAGERMAN, as Tax Collector of Sarasota County, Florida; GLOVER ASHBY, as Tax Assessor of Sarasota County, Florida; C. M. GAY, as Comptroller of the State of Florida, and LEROY FENNE,

Appellees.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL

Present Question Involved

This brief is filed in opposition to the appellees' motion dismiss the appeal. The case is upon appeal from the preme Court of the State of Florida under section 344 Title 28 of the United States Code, which is section 237 the Judicial Code, on the ground that there was drawn question the validity of a statute of the State.

The case below is reported in 33 So. 2nd, 34. The pellees' motion is based in essence on the contention at the controlling decisions of this court render the plication devoid of merit.

This belief is erroneous for the reasons, and under the authorities set forth in appellants' statement as to jurisdiction and as hereinafter amplified.

There are four trusts involved in this litigation. For the purpose of demonstrating the *substantial* nature of this appeal, the appellants in their STATEMENT AS TO JURISDICTION, have stressed the fourth trust which may be described for differentiation as the testamentary trust created by the will of Oscar Scherer, deceased, while the other trusts are inter vivos trusts created by one or other of the appellants.

If it appears that the provisions of the Fourteenth Amendement to the Constitution of the United States have been violated by the Florida statute in question only so far as this particular trust is concerned there arises a substantial question which should be considered by this court. By making this contention the appellants do not waive their right to contend that the taxing of the intangible property in the other trusts was improper, but, for brevity upon this application, prefer to rest on the mistreatment of the rights of appellant, Elsa S.Burrows, by subjecting to taxation her interest under the will of her late father.

One difference between this trust and the other trusts, which is not clear from appellees' statement opposing jurisdiction, is that this was not created by either appellant; neither appellant was ever a trustee of this trust; neither can revoke or change its provisions in any way.

The trust is described in paragraph IV (d) of the second amended bill of complaint, and a copy of the last will of its creator, Oscar Scherer, deceased, is annexed thereto

BLEED THROUGH– POOR COPY

as Exhibit Q—the particular trust being contained in paragraph Ninth of that exhibit.

Oscar Scherer was always a resident of New York; the trustee, Chatham & Phenix National Bank & Trust Co. (succeeded by the Manufacturers Trust Co.), was a New York corporation and has always held the corpus of the trust in that City, remitting the income from time to time to Elsa S. Burrows.

The motion of the appellees stresses particularly the claimed identity of the facts in this case with those in the case of *Commonwealth* v. *Stewart*, 338 Pa. 9, decided by the Supreme Court of Pennsylvania on March 25, 1940, two justices dissenting; and affirmed by this court, *per curiam* without opinion on January 13, 1941, three justices dissenting (312 U. S. 649).

The trust involved was not a testamentary trust but a deed of trust made by Mary Harriman of New York to a New York Trust Company to pay the income for life to her daughter, Carol H. Stewart of Pennsylvania. The Court said:

> "It must first be determined, therefore, whether appellee's right to the *income* of the trust for life constitutes an equitable interest in personal property." (p. 13)
>
> "The dissent in the state court distinguished this case from *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383, by saying appellee there did not enjoy a single thread of control which in the eyes of the law would operate to transport the situs of the property to her domicile and thereby confer jurisdiction upon Pennsylvania to levy a property tax. Either income or principal must be the subject of the tax. There is no third or middle ground for taxation between the two."

The Pennsylvania court was interpreting a statute of that State, and its interpretation of the language of its own peculiar statute is different from the interpretation of the statute of the State of Florida here in question.

The Supreme Court of Florida in one of its decisions referred to in the opinion here has recognized this rule. In *Owens* v. *Fosdick*, 153 Fla. 17, in a trust almost identical with this, and referring to the very statute herein questioned, that Court said:

> "The tax in question was assessed on January 1, 1942, the sole property right taxed being the *privilege of receiving income for life* from the trust fund. In accordance with rules promulgated by the State Comptroller, the present worth of the right or privilege was determined by the process of capitalizing the net income which Mrs. Fosdick had received for 1941, according to her life expectancy. The tax for 1942 was laid on the capital sum thus found." (p. 19) (Italics quoted from opinion)

That Court went on to say:

> "The taxing authorities say that the tax is not one laid on income, but *on the privilege of receiving income*, which they submit is a very valuable species of property distinct from income itself. The question, therefore, is whether under the facts of this case the taxation of the beneficiary's *right to receive net income for life* from the trusts in question can be distinguished from taxation of the income, which is prohibited by the Florida Constitution." (p. 20) (Italics quoted from opinion)

The Court kept in mind that the nature of the tax must be determined by its operation rather than its terminology and decided that it was a tax on income.

As above shown, the Court, in the *Owens* v. *Fosdick* case, *supra*, recognized frankly that the tax imposed by

BLEED THROUGH— POOR COPY

the statute objected to was a tax on income and could not be changed into anything else by manipulation of nomenclature—in this way it differed from the Pennsylvania court.

Appellant Elsa S. Burrows was restricted by the terms of the will of her father from disposal of her trust rights, as her father said in paragraph ninth of his will that he wanted this fund "safeguarded against all unforeseen contingencies of business and in order that my daughter may also be assured of the income of that sum."

The testamentary trust created to safeguard Elsa S. Burrows for life by its terms indicates restriction of alienation, and restricts that appellant's interest therein, only to receipt of income, which may not be taxed under the Constitution of Florida (*Owens* v. *Fosdick,* 153 Fla. 17).

The power of appointment in the will of Oscar Scherer, a New York resident, is not a right derived from the State of Florida and not taxable there since, under the law of New York, it represents property passing from a citizen of that State to the appointee. (*Wachovia Trust Co.* v. *Doughton,* 272 U. S. 567.)

Since the Constitution of the State of Florida prohibits a tax upon income, it must be obvious that the tax is upon the corpus which is without the State.

Consequently, the invalidity is established by the decision of this Court in *Brooke* v. *City of Norfolk,* 277 U. S. 27, which was referred to without reversal in the recent case of *Greenough et al.* v. *Tax Assessors of Newport, et al.,* 331 U. S. 486, where in the prevailing opinion the Court said:

> "In *Brooke* v. *Norfolk*, 277 U. S. 27, the State property tax there invalidated, evidently as violative of the Fourteenth Amendment, was assessed to a life beneficiary, on a res, composed of intangibles, when both the testator and the trustee were residents of another state where the trust was administered." (p. 496)

Such is the situation here.

The motion to dismiss should not be granted.

Respectfully submitted,

RICHARD J. MACKEY,
Counsel for Appellants.